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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Furnco Construction Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on March 8, 1977.

OPINIONS BELOW.

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 551 F. 2d 1085 and are reproduced herein as Appendices A and B, respectively. The decision of the District Court is reported unofficially at 13 FEP Cases 1020 and is reproduced herein as Appendix C.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on March 8, 1973 (Appendix A). A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on June 8, 1977 (Appendix B). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage far in excess of their statistical presence in the relevant labor force.

2. Whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

3. Whether a hiring practice not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are relevant portions of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U. S. C. § 1981, and are reproduced as Appendix D hereto.

STATEMENT OF THE CASE.

This case raises questions of significance to the enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U. S. C. § 1981, which were resolved by this Court in decisions published after the judgment of the Court of Appeals herein was entered and which seriously conflict with the decision below. *Hazelwood School District* v. *U. S.*, ____ U. S. ____, 97 S. Ct. 2736 (1977); *International Brotherhood of Teamsters* v. *U. S.*, ____ U. S. ____, 97 S. Ct. 1843 (1977). Moreover, this case concerns what constitutes a "legitimate, nondiscriminatory reason" for failing to hire minority job applicants under this Court's decision in *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973), and the proper fact-finding roles thereunder of district and circuit courts.

Petitioner Furnco Construction Corporation ("Furnco"), a mason contractor specializing in refractory installation in steel mills and blast furnace relining, contracted in August, 1971 with Interlake, Inc., to reline the "A" blast furnace at Interlake's Chicago Blast Furnace Plant.[1] While this furnace was being relined, Interlake's steel producing capacity was cut by more than two-thirds and 66 steelworkers were laid off. In order to minimize its financial loss of over $100,000 a day, Interlake insisted that the relining be performed on a 20-hour-a-day, seven-day-a-week schedule. Because of this and because firebrick work is highly specialized and must be performed properly in order to avoid the risk of explosion while the blast furnace is operating, Furnco was expected to hire the most skilled and experienced fire bricklayers it could obtain.

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1. A steel mill blast furnace is lined on the inside with refractory materials (firebrick) capable of containing molten metals. Due to the extraordinary stress placed upon the refractory materials, a blast furnace interior must be periodically relined with new firebrick.

Upon award of the Interlake contract, Furnco hired Joe Dacies as job brick superintendent. Dacies had worked as brick superintendent on several other jobs for Furnco, and one of the reasons Furnco hired him was his ability to contact and hire experienced fire bricklayers personally known to him. Although Furnco gave Dacies complete authority regarding selection, hiring, and retention of bricklayers, it was explicitly understood that he was to hire only experienced and qualified fire bricklayers. It was the practice of Dacies, Furnco, and the industry not to hire at the gate and it is undisputed that neither white nor black bricklayers were so hired by Furnco on the Interlake job. This was due to the critical need to ensure that only experienced and highly qualified fire bricklayers were employed on the job, for the business and safety reasons already noted.

Furnco also instructed Dacies that, in order to ensure equal employment opportunity on the Interlake project, and to bring project hiring into line with Furnco's voluntary affirmative action program, he should attempt to employ at least 16 per cent black fire bricklayers on the Interlake job, a figure considerably in excess of the percentage of black bricklayers in the local labor market. As found by the District Court, during the relevant period "5.7 per cent of the bricklayers in the relevant labor force were minority group members."[2]

In fact, Furnco's hiring practices resulted in Negro bricklayers working 13.3 per cent of the man-days worked on the Interlake job, or more than double the minority representation in the relevant labor market.

Respondents, eight black bricklayers who alleged that they appeared at the gate seeking employment, brought this action alleging that Furnco's hiring practices—particularly, its refusal to hire at the gate—were racially discriminatory under the Civil Rights Acts of 1866 and 1964, as amended.

Terming this "a most unusual case," the District Court found that not only had Plaintiffs failed to prove their case, but Furnco

2. App. C at A16 (Findings ¶ 12).

had "proven what it was not required to . . . Furnco has proven beyond all reasonable doubt that it did not engage in . . . racial discrimination . . . in its employment practices in regard to bricklayers on the Interlake job."[3]

Moreover, the District Court found that Furnco's hiring policies—including refusing to hire at the gate—were not only racially neutral on their face and in their application, but were entirely job related and were "beyond a reasonable doubt . . . justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons."[4] The court further found that, rather than being a pretext to exclude blacks, Furnco's hiring policies were, in fact, a vehicle for bringing black bricklayers on the job and "resulted in a percentage of Negro bricklayers [13.3 per cent] on the job far in excess of the percentage of Negro bricklayers [5.7 per cent] in the relevant labor market."[5] As such, after a six-day trial and the close of all the evidence, it dismissed all of Respondents' claims and entered judgment for Furnco.

On appeal, the Court of Appeals for the Seventh Circuit upheld the District Court's findings as to five of the plaintiffs, but, as to three, the appellate court reversed.

As to these three, the Seventh Circuit first found they had established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

The court then went on to find that a refusal to hire at the gate was discriminatory and constituted disparate treatment, even though neither white nor black bricklayers were hired at the gate and the District Court had found such a refusal justified by business necessity. The court held:[6]

3. App. C at A22 (Conclusions ¶ 10).
4. App. C at A20-21 (Conclusions ¶ 5).
5. App. C at A20 (Conclusions ¶ 4).
6. App. A at A6-7; 551 F. 2d at 1088-89.

"It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility to such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' Reed v. Arlington Hotel Company, Inc., 476 F. 2d 721, 724, 5 FEP Cases 789, 791 (8th Cir. 1973).

"Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft itself the result of past discrimination?[7]

Finally, the Court of Appeals flatly refused to consider Furnco's statistical showing that it hired minority bricklayers far in excess of minority representation in the relevant labor market, concluding:[8]

> "Where the percentage of minority members in a work force is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the work force being higher than the percentage in the group considered.
>
> * * * * *
>
> "In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

7. The court did not indicate whether it was referring to pre- or post-Act discrimination.

8. App. A at A8, 9; 551 F. 2d at 1089, 90.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH RECENT DECISIONS OF THIS COURT AS TO THE PROPER CONSTRUCTION OF THE CIVIL RIGHTS ACTS.

A. The Rejection of Statistics and Its Conflict with Hazelwood.

In its opinion below, the Seventh Circuit flatly ruled that the use of statistics in an employment discrimination case is a one-way street—that statistics can prove discrimination, but cannot disprove it. Thus, the Seventh Circuit held:[9]

> ". . . Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."

In reaching this startling conclusion, the opinion below not only ignored prior holdings of this Court, but is clearly in conflict with the decision of this Court in *Hazelwood School District v. U. S.*, ... U. S. ....., 97 S. Ct. 2736 (1977), decided some three months after the decision below was entered. The Circuit Court's blithe refusal to consider Furnco's showing that it employed Negroes on the Interlake job far in excess of their representation in the relevant labor market is simply untenable in the

9. App. A at A8; 551 F. 2d at 1089.

aftermath of this Court's express sanction of such a comparison in *Hazelwood*.

At the outset, it is important to note that the appellate court's rejection of the probative value of statistics is clearly out of the mainstream of decisions of this Court. As this Court noted in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843, 1856 (1977), "[O]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."

Thus, the decisions of this Court clearly mandate consideration of relevant statistical data as being probative of the question of disparity of treatment, as well as intent.

Moreover, this Court's decision in *Hazelwood* clearly controls the case here. In *Hazelwood*, as here, subjective hiring practices were alleged to result in disparate hiring of minority applicants in a job with high skill requirements. This Court concluded that (1) a statistical comparison between the minority representation in the skilled labor force capable of performing the work in question and the minority representation in the employer's work force is clearly probative of whether the employer has engaged in employment discrimination in hiring; and (2) it is for the trial court to select the appropriate relevant labor market for such an analysis.

As previously noted, 13.3 per cent of the man-days worked on the job in question were performed by Negro bricklayers. At trial, Furnco introduced evidence and the District Court found based on U. S. Government figures for the building trades for the Chicago metropolitan area, that for the applicable time period, 5.7 per cent of the bricklayers in the relevant labor force were minority group members.[10] Finding Furnco's hiring practices to

10. Respondents made a statistical submission, rejected by the District Court, consisting of a study taken two years after Furnco completed the job in question, offering to show the racial composition of the local bricklayers union. The study was based on

(Footnote continued on next page.)

be free of racial taint, the District Court concluded that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market."[11]

The significance of the statistics found by the District Court to the case herein cannot be so easily dismissed as the Seventh Circuit has done. This is fully demonstrated by this Court's reference in *Hazelwood* to the statistical analysis set forth in *Castaneda* v. *Partida*, ... U. S. ....., 97 S. Ct. 1272, 1281, n. 17 (1977), as "measuring the significance of . . . statistical disparity . . ." 97 S. Ct. at 2742, n. 14.

Indeed, applying the methodology of *Castaneda* to the facts herein—applying the standard deviation as a measure of the variance between the expected number of black bricklayers and those actually employed on the job—underscores that Furnco's hiring practices, instead of excluding blacks, had precisely the opposite effect. The statistical evidence demonstrates that Furnco purposely hired black bricklayers.

Thus, a comparison between the percentage of man-days worked by black bricklayers (13.7%) and the expected percentage of black bricklayers employed based upon their presence in the relevant labor force (5.7%) demonstrates that the actual number of black bricklayers employed was 13.9 standard deviations *greater* than the expected statistical number.[12] Statistically,

(Footnote continued from preceding page.)

information gathered by clerks who attempted to assign a racial classification to individual union members on the basis of names and addresses. The District Court found that Respondents' figures showed a percentage of Negroes in the local union of 13.1% (App. C at A16, n. 1) and the Court of Appeals found that the Respondents' figures indicated a percentage of 13.7% black bricklayers in the local union (App. A at A9; 551 F. 2d at 1090).

11. App. C at A20 (Conclusion ¶ 4).

12. Using the *Castaneda* methodology, the measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 1819 man-days)

(Footnote continued on next page.)

only one conclusion can be drawn: Furnco purposely hired Negroes, rather than purposely excluding them.[13]

In fact, using the figures most favorable to the Respondents, the statistical disparity between the relevant labor market (13.7% black bricklayers) and the percentage of man-days worked on the job by black bricklayers (13.3%), is less than one-half of the standard deviation of the number of blacks who statistically should be expected to be in the work force[14] and is well within the permissible range of two standard deviations suggested by the Court in *Hazelwood*. 97 S. Ct. at 2742, n. 14.

In short, far from being irrelevant, the statistical analysis mandated by this Court in *Hazelwood* confirms Furnco's testimony and position below that its hiring practices were designed to employ black bricklayers not to exclude them. The Seventh Circuit's flat refusal to consider the statistical evidence is wholly inconsistent with the teachings of this Court in *Hazelwood*.

B. The Absence of Intent and Its Conflict With Teamsters.

As this Court's *Hazelwood* decision coming after the decision below undermines the Seventh Circuit's decision, so does this Court's decision in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843 (1977), coming some two months after the decision below. The decision below found

(Footnote continued from preceding page.)
times the probability of selecting a Negro bricklayer (.057) times the product of selecting a non-Negro bricklayer (.943). The standard deviation derived is 9.89. The difference between the expected value (103.7) and the observed number (242) equals 138.3 or 13.9 standard deviations.

13. For example, this Court noted in *Castaneda* that 12 standard deviations mean that a chance selection would occur less than 1 in 10^{25}. 97 S. Ct. at 1272, n. 17.

14. Since 1819, total man-days were worked on the job and using Respondents' figures that 13.7% of the relevant labor market was comprised of black bricklayers, the expected number of man-days worked by black bricklayers would be approximately 249 (1819 times .137). The standard deviation is 14.67. Since 242 of the man-days were worked by black bricklayers, this constitutes less than one-half of one standard deviation.

that Furnco's refusal to hire at the gate—applied equally to blacks and whites—in fact, constituted disparate treatment. In reaching this conclusion, the Court of Appeals made no finding as to discriminatory intent or motive.

But, this Court made plain in *Teamsters* that such intent or motive is a necessary element of proof in an employment discrimination case alleging disparate treatment. Setting forth the dichotomy between the proof essential to an allegation of disparate treatment from that proof essential to a charge of disparate impact, this Court explained, 97 S. Ct. at 1854, n. 15:

> "Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical,* although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 265-266." (Emphasis added.)

It is quite clear that the Court of Appeals made no finding of discriminatory intent or motive. The appellate opinion is singularly devoid of any such finding. Indeed, such a finding would be unlikely in light of Furnco's attempts to increase minority hiring, and the work force figures reflecting the overwhelming success of Furnco's minority hiring policy. As this Court underscored in its decision in *Washington* v. *Davis*, ... U. S. ....., 96 S. Ct. 2040, 2051 (1976), statistics and attempts to recruit minority employees clearly go to establish or negate such intent or such purposeful discrimination:

> "[W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.' "

The Seventh Circuit's opinion, however, was entered without the benefit of this Court's instruction in *Teamsters* that in employment discrimination cases considering allegations of unlawful disparate treatment, "[p]roof of discriminatory motive is critical. . . ." Its finding of unlawful discrimination in the absence of a finding of unlawful intent or motive plainly conflicts with this Court's holding in *Teamsters*.

II. THE SEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDINGS AS TO THE ABSENCE OF DISCRIMINATION AND THE LEGITIMACY OF PETITIONER'S HIRING PRACTICES RAISE IMPORTANT FEDERAL QUESTIONS WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

As previously noted, the District Court had found that Furnco's hiring practices were job-related, racially neutral, applied evenhandedly, did not have a disproportionate impact on black bricklayers and were not used as a pretext to exclude blacks. These findings were, to the District Court, clear "beyond a reasonable doubt."[15]

The Seventh Circuit, in reversing the District Court, passed over these unambiguous findings as follows:[16]

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method,[17] and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973)."

15. App. C at A20, 22 (Conclusions ¶¶ 5, 10).

16. App. A at A6-7; 551 F. 2d at 1088-89.

17. Contrary to the Seventh Circuit's opinion, in fact the District Court specifically found written applications to be an impractical method of hiring in the context of the job in question. App. C at A16 (Findings ¶ 13).

In reversing the District Court's finding—and these were so clear to the trial court that it made them "beyond a reasonable doubt"—as to the legitimacy, job relatedness and business necessity of Petitioner's hiring practices, the Seventh Circuit applied no recognized standard of review,[18] choosing instead to substitute its own judgment for that of the District Court. Such a substitution, of course, flies in the face of this Court's decision in *Hazelwood* as to the appropriate fact-finding roles of district and circuit courts. As this Court noted therein regarding a parallel issue, "Only the trial court is in a position to make the appropriate determination after further findings." 97 S. Ct. at 2744.

At its core, however, the Seventh Circuit appears to equate subjective hiring standards with employment discrimination. In this respect, the Seventh Circuit's decision conflicts with this Court's decision in *McDonnell-Douglas* and the Fifth Circuit's decision in *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974), both to the effect that subjective hiring standards, in the absence of discriminatory impact or disparate treatment, are plainly lawful.

The vice of the Seventh Circuit labelling the system used—the first-hand experience of the brick superintendent with bricklayers on other jobs and recommendations from others[19]—

18. For example, the Court of Appeals *never* found the District Court's findings on these issues "clearly erroneous." *U. S.* v. *U. S. Gypsum*, 333 U. S. 364, 394 (1948).

19. There was no evidence before the District Court that the actual hiring system used resulted in anything other than the hiring of the most highly skilled and experienced fire bricklayers.

as being "haphazard, arbitrary and subjective" is underscored when it is recognized that the system found "feasible" by the Seventh Circuit is no less infirm. Carefully considered, the Seventh Circuit, in rejecting the District Court's findings, apparently seeks to trade one set of supposedly arbitrary, haphazard and subjective judgments for another.

In this respect, the Seventh Circuit indicates that once an application is received, "the applicant's claims could be checked and evaluated and compared with the qualifications and experiences of those on the list."[20] This, however, would mean that the superintendent would have to call up other contractors and superintendents and ask for references, *i.e.*, rely on "recommendations he accepted from others," precisely what the Seventh Circuit found to be "haphazard, arbitrary and subjective" herein.

Moreover, how are the judgments of such other contractors and superintendents any less subjective, haphazard and arbitrary than Furnco's superintendent's own first-hand knowledge? Indeed, such a reference system is even more fraught with discrimination and haphazardness because Furnco's superintendent has no way of evaluating either the knowledge of the person making the reference and/or whether or not that person's judgment is tainted by racial prejudice. And, how is he to evaluate the judgment of others—who may be entire strangers to him—against his own personal knowledge that bricklayers he could hire would competently do the work? In short, allowing the Court of Appeals *sua sponte* to substitute its judgment as to the legitimacy and job relatedness of hiring practices not only usurps the District Court's function, but requires an employer to follow hiring practices not only untested, but potentially inimical to its business and racially discriminatory.

In addition, the Seventh Circuit opinion, by requiring the employer to demonstrate the feasibility of alternative hiring systems, turns the test of *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), on its head. *Albemarle Paper Co.*, makes it

20. App. A at A6; 551 F. 2d at 1088-89.

clear that the party challenging a hiring mechanism proven to be job related bears the burden of showing acceptable alternative hiring methods:

> "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'. [*McDonnell-Douglas Corp.* v. *Green*, 411 U.S. at 801]." 422 U. S. at 425.[21]

Clearly the teaching of *Albemarle Paper Co.*, is that where, as here, the employer has demonstrated the job related nature of its hiring policies, the appellate court is not free to impose a novel hiring scheme of its own devise.

In short, the Seventh Circuit's decision, as it substitutes its judgment for that of the District Court as to whether or not Petitioner's hiring practices were job related and/or were justified by legitimate business reasons flies in the face of this Court's decision in *Hazelwood*. Moreover, by finding that a subjective hiring system is *ipso facto* discriminatory based on nothing more than the possibilities of discrimination, rather than the evidence herein which demonstrated an absence of discrimination, the opinion below conflicts with *McDonnell-Douglas* and the Fifth Circuit's decision in *Hester*. If allowed to stand, the decision below will allow the courts of appeals, unrestrained by either the evidence before the district court or its findings, to impose their own hiring schemes on employers under the mantle of the Civil Rights Acts.

CONCLUSION.

The decision of the Seventh Circuit herein does not and indeed cannot be squared with this Court's later decisions in *Hazelwood* and *Teamsters*. What the Seventh Circuit would have done had it

21. Significantly, there is no evidence whatsoever that the hiring method found "feasible" by the Court of Appeals would have resulted in the hiring of as many black bricklayers as did Furnco's actual hiring practices.

the benefit of these cases is, of course, speculative; but that its decision conflicts with this Court's recent pronouncements in the area of employment discrimination cannot be seriously doubted. This case raises vital questions to the enforcement of the civil rights laws in that the Seventh Circuit's decision flatly rejects statistics as a means of showing that no racial discrimination occurred—indeed that the employer vigorously sought out and employed Negro bricklayers—and effectively prevents employers from using statistics to rebut claims of discrimination. As the decision below found disparate treatment in the absence of any finding of discriminatory intent or motive, the decision is a clear departure from the law as now settled by *Teamsters*. And, finally, the decision below fundamentally misconstrues the Court of Appeals' role and the appropriate legal standard in reviewing findings as to the legitimacy and job relatedness of hiring standards in employment discrimination cases.

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1347

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs-Appellants,

vs.

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72-C-2305
Richard B. Austin, Judge.

Argued October 30, 1975—Decided March 8, 1977

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and CHRISTENSEN, *Senior District Judge.**

FAIRCHILD, *Chief Judge*. Plaintiffs are eight black bricklayers who allegedly sought employment on a firebrick job, relining a blast furnace, performed by defendant Furnco. Furnco declined to consider applications, following its policy, but hired principally from an existing list containing names of white bricklayers, supplementing the list by names of a few black bricklayers, obtained from other sources. The principal issue is

* Senior District Judge A. Sherman Christensen of the District of Utah is sitting by designation.

whether, because of the denial of access to the employment process, plaintiffs proved a cause of action under 42 U. S. C. § 1981 or Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e, *et seq.*

Plaintiffs appeal from a judgment for defendant, entered upon adverse findings after a bench trial.

I

Furnco is a mason contractor, doing business over a large area of the country. In August, 1971, it contracted with Interlake Steel Corporation to reline with firebrick a blast furnace and related facilities in Chicago.

Furnco selected Joseph Dacies as brick superintendent for the Interlake job. Bricklayers were not hired at the gate, nor were applications taken from those who came to the gate. Instead, in accordance with past practice, Dacies was expected to hire bricklayers in whom he had confidence, and he had a list of bricklayers with whom he had worked on previous jobs. The bricklayers whose names he had from this source were all white, although he had occasionally worked with black bricklayers.

Because of past charges of discrimination on jobs in Cook County, Illinois, Furnco had decided to have "a minimum, if at all possible, of 16 per cent of the bricklaying force black." It applies this policy in Cook County only. Mr. Wright, general manager of Furnco, directed Dacies to follow this policy, and Dacies obtained names of black bricklayers by inquiry of other superintendents, and the like.

Dacies hired his first bricklayer on August 26, 1971. Several plaintiffs had been at the job site before that. He hired the second August 27, the third September 7, and the fourth September 8. All were white. The first black bricklayer was hired September 9. Of the next eight bricklayers, hired by September 13, one was black. Of the next seven, hired by September 17,

one was black. Of the next seventeen, hired by September 23, one was black. Up to October 10, 41 had been hired, four of whom were black.

Laying firebrick on this type of job is considered lucrative, and the earlier a bricklayer was hired, the longer he had an opportunity to work. The first hired worked 76 days. The first black person hired worked 56 days. A bricklayer hired September 27 worked 38 days.

Prior to, and during the early part of the Interlake job, Furnco was engaged in settlement negotiations with black bricklayers concerning claims of discrimination on an earlier job.[1] When these negotiations broke off in late September, Wright suggested to Dacies that he consider hiring those who were plaintiffs in the earlier case. On October 12 to 18, Dacies hired six of them, the only bricklayers hired from September 25 to October 21. Of these six, Hawkins, Smith, Pearson, and Williams are present plaintiffs. Smith, conceded by all to be qualified, worked a total of 20 days, Wilson 9, Williams 12, and the other three, Hawkins, Pearson, and Pendarvis were fired in two or three days.

Since the situations of the plaintiffs vary, we consider them as follows:

1. *Gilmore.* Plaintiff Gilmore had never worked in firebrick. He testified that he went to the Interlake job site the last week in August. His testimony was markedly inconsistent with his answers on deposition and in interrogatories. The court evidently did not believe his testimony, or the testimony of others who said they saw him at the job site. The court found no credible evidence that he attempted to apply for work on the Interlake job. The question is one of credibility, it is difficult to understand the variation in testimony, and we do not consider the finding clearly erroneous. Thus judgment against Gilmore is to be affirmed.

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1. See *Batiste* v. *Furnco Construction Corp.*, 503 F. 2d 447 (7th Cir. 1974).

2. *Williams.* Plaintiff Williams was one of the plaintiffs in the earlier case whose names were referred to Dacies by Wright. Dacies hired him at Interlake October 18, and he worked 12 days, until October 29. He testified he had gone to the job site in the latter part of August. As with Gilmore, other answers were grossly inconsistent. The court did not believe he attempted to apply at the job site, and we do not consider the finding clearly erroneous.

3. *Waters.* Plaintiff Waters wrote a letter to Wright in August, inquiring about work at Interlake. Wright passed his name to Dacies, for consideration. The district court found: "Dacies informed Wright that he had previously fired Waters on a job for insubordination and that he would not consider hiring him. There is no evidence whatsoever that Dacies has ever hired a bricklayer, white or Negro, who he had previously fired for insubordination or that his stated reasons for not considering Waters for employment were pretextual or designed to cover up a racially discriminating decision."

The parties agree that Waters and Dacies worked on a job in 1962. The bricklayers heard that another contractor on the same job was using laborers to do bricklayers' work, and Waters went to the other work area to investigate on two occasions. Dacies discharged him for leaving his work area, and when Waters refused to leave the premises, he was arrested and taken away. There is a dispute whether Waters left his work only during his lunch hour or whether he had left on a number of occasions and had been warned. The court's finding is not clearly erroneous.

The district court declined to allow plaintiffs' counsel to inquire about the disposition of the criminal charges brought against Waters. There was no offer of proof, although the record does suggest the charges were dismissed. The issue before the court was Dacies' true motivation at the time of the discharge and in later treating it as a reason for not hiring Waters. The merits or disposition of the criminal charge seem remote. In the

absence of an offer of proof, demonstrating relevance, it was not an abuse of discretion to exclude further inquiry.

4. *Hawkins and Pearson.* Plaintiffs Hawkins and Pearson were among the group of black bricklayers whose names were referred to Dacies by Wright after the breakdown of negotiations with respect to a different dispute. Hawkins was hired October 12 and discharged October 13 at the same time as Gibertini, a white bricklayer. Pearson was hired October 13 and discharged October 15, the same day as Pendarvis, a black bricklayer who is not a plaintiff. The district court made findings as to poor workmanship which caused the discharges, and found there was no evidence that they were discriminatory or retaliatory. The findings are not clearly erroneous.

5. *Samuels, Nemhard, and Smith.* The district court found that Samuels, Nemhard, and Smith, as well as Waters, Hawkins, and Pearson, attempted to secure employment on the Interlake project by appearing at the job site gate. In addition, Nemhard as well as Waters, made written application. Except for Waters, as already recounted, and Smith, these attempts to apply did not bring about any consideration by Furnco, because of its policy. Smith was told by Dacies that Dacies would call him, and defendant concedes Smith's qualifications. Dacies did not, however, employ Smith until October 12, among the group of six black bricklayers employed from October 12 to 18, after the breakdown of settlement negotiations in the *Batiste* case.

Smith, hired as late as he was, had the opportunity to work only 20 days, Samuels and Nemhard were never hired. As already stated, Smith's qualifications were conceded. Samuels had 17 years experience as a bricklayer, and had been employed by several firebrick contractors, including Furnco on an earlier job. Nemhard had 29 years as a bricklayer, and had experience with firebrick on a job lasting about a year and a half.

In *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973), the Supreme Court noted the complainant's burden in a Title VII case of establishing a *prima facie* case: "This may be

done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

These plaintiffs belong to a racial minority; they did all they could to apply, and were qualified for the jobs which were about to be open; they were refused consideration (although not permanently in Smith's case), and thereafter the employer sought out and employed persons of similar qualifications.

Defendant poses two defenses. One is that a white person of similar qualifications, but not on Dacies' list, would have achieved no better a result. The other is that the importance of selecting people whose capability had been demonstrated to defendant's brick superintendent is a "legitimate, nondiscriminatory reason" for defendant's refusal to consider plaintiffs. Although the district court agreed, we do not. The district court set forth the importance to defendant of hiring bricklayers with firebrick experience who could perform the work competently and expeditiously. The court further pointed to the disadvantages of hiring "at the gate," the difficulty of evaluating qualifications of persons appearing at the gate and avoiding discrimination, and the "chaotic" procedure involved in hiring "at the gate."

It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others,

was by its nature haphazard, arbitrary, and subjective. "Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring." *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973).

Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), the Supreme Court dealt with the use of testing devices in deciding whether to employ or to promote. The Court held, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." P. 431. Devices and mechanisms must not be given "controlling force unless they are demonstrably a reasonable measure of job performance." P. 436.

As we understand the *Griggs* principle, it provides a method for establishing the presence of discrimination where application of a test to a group of employees or applicants results in a proportionally higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of bricklayers he considered competent was not a test or device for comparing the members of a group of prospective employees, for there was no defined group. Defendant appears to be treating its reliance on the list as such a device, and the entire body of bricklayers in the area as the group under consideration. Defend-

ant seems to be turning the *Griggs* principle around, and making it establish absence of discrimination because the group employed by it has a higher percentage of minority members than does the entire relevant labor force. Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered.

Four out of the first 44 bricklayers hired, or almost 10%, were black. Eleven out of the total of 55, or 20%, were black. Out of the total of 1819 man-days worked on the job, 242, or 13.3%, were worked by black bricklayers. Although disputed, the court found that 5.7% of the bricklayers in the relevant labor force were minority group members. Seemingly, defendant contends these figures demonstrate that its method of selection did not discriminate on the basis of race.

We do not agree. Although black bricklayers would fill a fraction of the jobs (approximately 13-16%), these were people who in some manner came to Dacies' attention. Plaintiff Samuels and Nemhard had no chance at those jobs. White bricklayers also tended to be employed earlier and therefore obtained the longer lasting and more profitable jobs. Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers. At all times, these were to be filled from Dacies' list, naming only white bricklayers. This was not a case, like *Griggs*, of comparing white and black applicants by objective, but irrelevant standards, and rejecting more blacks, proportionally, than whites. The qualifications of Samuels and Nemhard were never compared with either the black bricklayers who filled the small portion of the jobs, nor the white bricklayers who filled the great majority of the jobs. Consideration of Smith was delayed. Vis-à-vis the black bricklayers employed, plaintiffs could not claim that their rejection was based on race, but vis-à-vis the white bricklayers employed in 84-87% of the jobs, racial

discrimination is established under the principle of *McDonnell Douglas*.

As to plaintiffs Samuel, Nemhard, and Smith, the judgment must be reversed.

II

In finding that 5.7% of the bricklayers in the relevant labor force are members of minority groups, the district court relied on statistics in "The Chicago Plan," 41 C. F. R. § 60-11, a regulation issued by the Office of Federal Contract Compliance, U. S. Department of Labor to implement E. O. No. 11246, 5 U. S. C. § 7342. The statistics were compiled during a hearing in 1969, and reflect, at least as estimates, the labor market in Cook County and five nearby counties.

Plaintiff sought to introduce testimony by the president of Local 21 of the Bricklayers' Union concerning the racial composition of the Local, the jurisdiction of which is Cook County. The study was made in 1973, and, according to an offer of proof, would have shown that out of a total membership of 3,800, between 510 and 530 were identified as black. The events at issue occurred in 1971. The district court refused to hear the testimony.

If the percentage of black bricklayers in the local labor force is relevant at all, we think it was an abuse of discretion to reject the offered testimony as irrelevant. Arguably a count of the Union in 1973 is as helpful in deciding what the proportion was in 1971 as estimates made in 1969. Arguably, also, the percentage in the Union covering Cook County is more appropriate for consideration than the percentage in the six-county area.

In dealing with the merits, however, we have not relied on the racial proportions in the labor force. In any event, the offered 1973 Union figures indicate a percentage of 13.7 black bricklayers, and in view of the fact that 13.3% of the man-days worked on the job were worked by black bricklayers, the fact that Furnco set a goal of 16% black bricklayers, and the fact that 20% of the individuals hired were black, the error in excluding the Union figures would not be prejudicial.

Insofar as judgment was awarded against plaintiffs Samuels, Nemhard, and Smith, it is reversed and the cause remanded for further proceedings consistent with this opinion. In all other respects the judgment is affirmed. Costs on appeal are allowed to plaintiffs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. A. SHERMAN CHRISTENSEN, *Senior District Judge**

WILLIAM WATERS, et al.,
Plaintiffs-Appellants,

No. 75-1347 *vs.*

FURNCO CONSTRUCTION CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 2305

Richard B. Austin, Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.
Note: Judge Philip W. Tone did not participate in this matter.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,
Plaintiffs,
vs.
FURNCO CONSTRUCTION CORPORATION,
Defendant.

No. 72 C 2305

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was brought by eight Negro bricklayers against Defendant Furnco Construction Corporation for monetary, declaratory, and injunctive relief for alleged violations of the 1866 Civil Rights Act and Title VII of the 1964 Civil Rights Act. 42 U. S. C. § 1981, 2000e *et seq*. Trial commenced before this Court on January 24, 1975. After the presentation of all evidence and upon Defendant's motion, I make the following:

FINDINGS OF FACT

1. Plaintiffs William Waters, Sylvester Williams, Willie G. Pearson, Vandy Hawkins, Curtis Gilmore, Donald Samuels, Robert Nemhard, and William Smith are Negro bricklayers.

2. Defendant Furnco Construction Corporation maintains its principal place of business in the State of New York and does business in the State of Illinois and in Cook County. Furnco is engaged in industrial construction specializing in refractory installation in steel mills and, more particularly, the rehabilitation or relining of blast furnaces. Furnco is an employer within the meaning of Sections 701(b) and (h) of Title VII, in that it is in an industry affecting commerce and employs more than fifteen (15) employees.

3. On or about August 1, 1971, Furnco was awarded a contract to reline the "A" blast furnace at the Chicago Blast Furnace Plant of Interlake, Inc., 10730 South Burley, Chicago, Illinois. Approximately two-thirds of Interlake's pig iron production in Chicago is derived from its "A" blast furnace. In performing the "A" blast furnace reline, Furnco employed a variety of skilled crafts including bricklayers.

4. Shortly after being awarded this contract, Furnco hired Joseph Dacies to serve as brick superintendent on the Interlake job. Dacies had worked in such a capacity for Furnco on numerous other jobs. He had sole and complete authority on behalf of Furnco regarding the selection, hiring, and retention of bricklayers.

5. In discharging his responsibilities, Dacies endeavored to hire only fire-bricklayers with whom he had previously worked in blast furnace relines, or who were recommended as being skilled in such work. In this manner, Dacies sought to insure that only the most competent, qualified, and experienced fire-bricklayers, skilled in blast furnace relines, were employed on the job.

6. The critical need to insure that only experienced and highly qualified fire-bricklayers who could perform the work in the most competent and timely manner were employed on the job was based upon the following:

(a) The work involved was firebrick, a specialized form of bricklaying which requires special skills and abilities

not possessed by all bricklayers. Such firebrick work involving a blast furnace reline, as on the Interlake job, is a specialized skill among fire-bricklayers.

(b) Time spent performing the work was of the essence since, while the reline was being performed, the blast furnace was entirely shut down. The value of pig iron production lost by Interlake during this period was in excess of $100,000 per day. In addition, while the blast furnace was shut down, 66 Interlake employees were laid off.

(c) The agreement between Furnco and Interlake provided that the work was to be performed at a fixed price and in a fixed time period. Since 80 per cent of Furnco's costs in performing the job were directly attributable to labor costs, Furnco's ability to make a profit on the job was directly related to the speed and competence with which its bricklayers could perform their work.

(d) Work done improperly by Furnco could lead to future maintenance costs with attendant lost production and employee layoffs for Interlake. If work were performed improperly, Furnco could be held liable for the costs of redoing the work and for Interlake's consequential loss of production.

(e) Work done improperly posed serious potential safety hazards. Improper brickwork could lead to an explosion while the blast furnace was operating with consequent loss of life and property.

(f) The more expeditiously the job was completed, the sooner Furnco would be paid by Interlake, thereby reducing the interest charges to Furnco in financing the work.

(g) If the job were performed improperly or untimely, this would affect Furnco's reputation and its ability to obtain future work from both Interlake and other steel mills.

7. The above factors precluded Furnco from (a) hiring bricklayers who were not known by its superintendent to be experienced and highly qualified in firebrick or (b) engaging in any on-the-job training. Plaintiffs' witnesses acknowledged the foregoing to be true, correct, and accurate.

8. Following the established practice in the industry, Dacies attempted to contact and hire only fire-bricklayers who he knew to be experienced and competent in this type of work. The overwhelming number of bricklayers hired on the job fell into this category. The other bricklayers on the job were hired after being recommended to Dacies as skilled in this type of work by his general foreman, one employee (a Negro), or another Furnco superintendent in the area. At the same time, following instructions from Furnco's General Manager John Wright, Dacies attempted to employ, as far as practicable, at least 16 per cent Negro bricklayers on the job. This policy was due to Furnco's self-imposed affirmative action plan which intended to insure that Negro bricklayers were employed on jobs performed by Furnco in Cook County in numbers substantially in excess of the percentage of Negroes in the local bricklayers' union.

9. This affirmative action program was initiated by Furnco following a job performed by it in 1969-70 at U. S. Steel Southworks plant in Chicago from which charges of racial discrimination in hiring were filed by several Negro bricklayers. Thoses charges resulted in an Illinois Fair Employment Practices Commission (FEPC) Hearing Examiner's decision in favor of Furnco, which was reserved by the FEPC and is currently pending on appeal in the Illinois courts. The merits of a parallel federal action remain to be adjudicated. *See Batiste et al.* v. *Furnco*, 503 F.2d 447 (7th Cir. 1974).

10. Prior to and while the Interlake job was in progress, Furnco and the *Batiste* plaintiffs were engaged in settlement ne-

gotations. In late September 1971, these negotiations broke off. Shortly thereafter, in an effort to show good faith, Furnco's General Manager Wright contacted Dacies with the names of the *Batiste* plaintiffs and told him that these individuals were Negro bricklayers who alleged they could perform firebrick work and that Dacies might consider hiring them. Dacies subsequently hired most of them. The prior failure to hire these individuals and the subsequent discharge of Plaintiffs Hawkins and Pearson were not, as alleged in Plaintiffs' Amended Complaint in retaliation against these parties or those associated with them.

11. The first bricklayer on the Interlake job was hired by Furnco on August 26, 1971 and the last one was laid off on November 17, 1971. The total number of man-days worked by all bricklayers employed by Furnco on the Interlake job was 1,819 man-days. Of that total, 242 man-days, or 13.3 per cent were worked by Negro bricklayers.[1]

12. From late 1969 through late 1973, the time period encompassing the Interlake job, 5.7 per cent of the bricklayers in the relevant labor force were minority group members. See 41 C. F. R. §§ 60-11 *et seq.*, the "Chicago plan." Plaintiffs offered no other admissibly relevant statistics, nor did they present any evidence tending to rebut the validity of the above statistics.

13. Plaintiffs William Waters and Robert Nemhard attempted to secure employment as fire-bricklayers on the Interlake job via written application. This method of application was not utilized by Dacies or Furnco since it provided no basis upon which to judge the applicant's ability to perform the type of work done on the Interlake job. There is no showing

1. Plaintiffs offered to prove that a study conducted in late 1973 by the local bricklayers' union by matching members' name and their race would show that, as of that time, out of approximately 3800 members, approximately 500 were Negro. A study taken two years after Furnco completed its job, and showing a percentage of Negroes in the local union of 13.1 per cent, which is a lower percentage of Negro bricklayers than Furnco employed, is hardly probative evidence of racial discrimination in this case.

that this business practice is illegitimate, discriminatory, has a disproportionate impact on blacks, or was used by Furnco as a pretext to exclude Negroes. In fact, when Wright received Waters' letter in mid-August 1971, he contacted Dacies and advised him that Waters was a Negro bricklayer he might consider hiring. Dacies informed Wright that he had previously fired Waters on a job for insubordination and that he would not consider hiring him. There is no evidence whatsoever that Dacies has ever hired a bricklayer, white or Negro, who he had previously fired for insubordination or that his stated reasons for not considering Waters for employment were pretextual or designed to cover up a racially discriminatory decision.

14. Plaintiffs William Waters, Willie G. Pearson, Vandy Hawkins, Donald Samuels, Robert Nemhard, and William Smith attempted to secure employment with Defendant on the Interlake job by appearing at the jobsite gate. The only such person Dacies spoke to at the gate area was Smith, who had worked for Dacies previously. Dacies told Smith that he had intended to contact Smith for the job. Smith was, in fact, subsequently hired. In addition, Dacies accepted no applications, from either blacks or whites, at the gate and did not hire at the gate. As a matter of policy followed by Dacies, by Furnco, and by the firebrick industry, hiring of firebricklayers is not done at the gate for the following reasons:

(a) It would inordinately tie up the brick superintendent who has numerous other duties and responsibilities during the course of the job.

(b) It does not provide an efficient method of matching qualified applicants to job requirements.

(c) It provides no means to assure that the person at the gate is even a bricklayer, let alone one skilled in firebrick and capable of performing all the work required without substantial training.

(d) It poses the risk of discrimination in that there are no means to evaluate the qualifications of an appli-

cant at the gate and hence racially invidious considerations could enter the hiring process.

(e) The methods employed by Furnco of obtaining experienced and highly qualified fire-bricklayers are far more efficient and assure the employment of such persons. The hiring of bricklayers at the gate would be chaotic and would endanger Furnco's ability to perform its contract with Interlake in a timely, competent, and profitable manner.

15. Furnco's hiring policies and practices in regard to bricklayers on the Interlake job were racially neutral, were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons. There is no evidence that these policies and practices either were a pretext to exclude Negro bricklayers or had a disproportionate impact or effect on Negro bricklayers.

16. No credible evidence was presented that Plaintiffs Curtis Gilmore and Sylvester Williams attempted to apply for employment with Furnco on the Interlake job in any manner.

17. Plaintiffs Vandy Hawkins, Willie G. Pearson, William Smith, and Sylvester Williams were, in fact, hired and worked for Furnco as fire-bricklayers on the Interlake jobsite.

18. On October 13, 1971, Plaintiff Vandy Hawkins was discharged along with a white bricklayer, Frank Gibertini, because of the poor work they had performed the previous day when they were both engaged in laying a course of brick on the bottom of the blast furnace. This work was critical in nature and required a high level of workmanship. Although the work of other bricklayers working near Hawkins and Gibertini was apparently also poor, in part because of Hawkins' and Gibertini's work, the foreman in charge had to repeatedly indicate to Hawkins and Gibertini that their work was unacceptable and had to improve. Furthermore, subsequent inspection

revealed that the worst and most clearly unacceptable work was that performed by Hawkins and Gibertini. All work on the furnace bottom installed the previous day had to be torn out and relaid at considerable expense and delay to Furnco. There is no evidence that Hawkins' discharge was either discriminatory or retaliatory.

19. On October 13, 1971, Plaintiff Willie G. Pearson was engaged in installing insulation block in the bustle pipe that runs along the outside circumference of the blast furnace. His work was of unacceptable quality, the blocks having been installed backwards with poor cuts. On a subsequent shift, his work either fell out or had to be torn out. Thereafter, Pearson was given another chance and assigned to work in the Number 3 Hot Blast Valve Trunk. On October 16, 1971, after one and one-half days working in that area, Pearson was discharged as a result of the unacceptable quality of his workmanship and the extremely low number of bricks he laid while assigned there. In the ten-hour shift on October 16, 1971, Pearson laid only sixteen bricks, while the average number that should have been laid by a bricklayer working in that area was 150-200 during a similar period of time. Most of the work he performed that day was of such poor quality that it had to be torn out. There is no evidence that Pearson's discharge was either racially discriminatory or retaliatory.

20. William Smith and Sylvester Williams were laid off from the job as part of the general reduction of the work force. There is no evidence whatsoever that their layoffs or their treatment while on the job was either racially discriminatory or retaliatory.

21. Any finding of fact herein which may be construed, in whole or in part, as a conclusion of law shall be deemed as such.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction over the parties and over the subject matter of this action under Title VII and/or 42 U. S. C. § 1981.

2. The burden of proving that, on the Interlake job, Furnco engaged in racial discrimination in its employment practices or in retaliatory conduct in violation of either Title VII or Section 1981 rested with the Plaintiffs. *McDonnell Douglas* v. *Green*, 411 U. S. 792, 93 S. Ct. 1817, 1824 (1973).

3. Plaintiffs have failed to prove that Furnco engaged in racial discrimination or retaliatory conduct in its employment practices in regard to Plaintiffs on the reline job it performed on the "A" blast furnace at Interlake's Chicago Blast Furnace Plant from August to mid-November 1971.

4. Furnco's hiring policies of not hiring bricklayers at the gate, not accepting written applications, and/or only hiring as bricklayers those individuals who its superintendent knew to be capable, highly competent and experienced fire-bricklayers were racially neutral on their face and were applied equally to both Negro and white bricklayers. There is no showing that these policies had a disproportionate impact or effect on Negroes in any respect. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974). On the contrary, Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market.

5. Furnco's employment practice of attempting to hire those individuals that its superintendent knew to be the most experienced and qualified fire-bricklayers comported with both Title VII and § 1981. *See Waters* v. *Wisconsin Steel, supra,* 502 F. 2d at 1320. Moreover, the evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business

necessity in that they were necessary for the safe and efficient operation of Furnco's business and were based upon nondiscriminatory legitimate business reasons. *See, e.g., Hodgson* v. *Greyhound Lines, Inc.*, 7 FEP Cases 817 (7th Cir. 1974); *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972).

6. Plaintiffs have failed to prove that Furnco's hiring policies were racially discriminatory under the line of cases following *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). They have similarly failed to prove a case of discrimination under the doctrine of *McDonnell Douglas* v. *Green*, 411 U. S. 792 (1973). Assuming arguendo that Plaintiffs were qualified —and the evidence is that some of the Plaintiffs had little or no firebrick experience, let alone experience performing blast furnace reline work—Furnco's failure to hire them was pursuant to its legitimate and nondiscriminatory hiring policies which were justified as a business necessity. Plaintiffs have failed to prove that these policies were racially pretextual or discriminatory in application.

7. In addition, Furnco's policy of not training persons on the job was racially neutral, applied to both Negroes and white bricklayers, did not have a disproportionate impact on Negroes and was not used as a pretext to exclude Negroes. Furnco was not required as a matter of law, under either Title VII or Section 1981, to train bricklayers in the performance of firebrick work or blast furnace reline work. *See Long* v. *Ford Motor Co.*, ... F. 2d ....., 7 FEP Cases 1053 (6th Cir. 1974). Moreover, Furnco's "no-training" policy was entirely justified as a business necessity and was based upon nondiscriminatory legitimate business reasons.

8. The failure to hire Plaintiff William Waters was based upon his previous discharge by Dacies for insubordination. A refusal to hire upon such grounds is clearly legitimate in the absence of a showing by the Plaintiffs that the refusal is a disguise for a racially discriminatory decision. *McDonnell*

Douglas v. *Green, supra.* Plaintiffs have entirely failed to show that Dacies' refusal to hire Waters on the basis of his prior discharge by Dacies for insubordination was either racially pretextual or discriminatory in its application.

9. The evidence is clear beyond a reasonable doubt that Plaintiffs Hawkins and Pearson were discharged on the job for just cause due to their poor work performance. There is no evidence whatsoever that either was discharged for discriminatory reasons or for retaliatory reasons within the meaning of § 704(a) of Title VII.

10. This is a most unusual case. Not only have Plaintiffs entirely failed to establish that Furnco's employment practices on the Interlake job discriminated against them on the basis of race or constituted retaliatory conduct but Defendant has proven what it was not required to. By its cross-examination and direct evidence, Furnco has proven beyond all reasonable doubt that it did not engage in either racial discrimination or retaliatory conduct in its employment practices in regard to bricklayers on the Interlake job. As such, Defendant's Motion to Dismiss at the close of all the evidence must be granted. Judgment will be entered in favor of the Defendant and against Plaintiffs and each of them.

11. Any conclusion of law herein which may be construed, in whole or in part, as a finding of fact shall be deemed as such.

/s/ RICHARD B. AUSTIN,
Judge, United States District Court.

Dated: February 10, 1975.

APPENDIX D

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000-e et seq.

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Sec. 706. (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was

suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.